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C O N F I D E N T I A L SECTION 01 OF 04 OTTAWA 003439

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STATE/PM PASS DAS SUCHAN

E.O. 12958: DECL: 11/20/2016

TAGS: [PREL](#) [ETTC](#) [MARR](#) [CA](#)

SUBJECT: DAS SUCHAN DISCUSSES ITAR WITH CANADIAN AUTHORITIES

Classified By: POLMINCOUNS Brian Flora. Reasons: 1.4 (b) and (d).

¶1. (C) Summary: Canadian officials and defense industry claim that U.S. refusal to authorize (under the ITAR) access to U.S. defense items by Canadian dual nationals of "proscribed countries" violates the Canadian Charter of Rights and Freedoms and is jeopardizing Canada's multi-billion dollar procurements of defense articles, as well as Canada's ability to participate in coalition warfare in areas like Afghanistan, although only a small percentage of DND employees (including military officers) are affected. U.S. law and the ITAR (Part 126.1) prohibit the transfer of U.S. defense items to proscribed countries (like China, Iran and North Korea) and their nationals. U.S. officials visiting Ottawa said the USG does not plan to authorize release of U.S. defense technology to nationals of such countries but expressed a willingness to apply a "rule of reason" to determine whether a person is a national of a proscribed country. The Department of National Defense (DND) proposes to address U.S. concerns by restricting access to DND employees and contractors with Secret-level security clearances. A DND delegation will continue this discussion in Washington on November 21. A solution to the problem of access with Canadian industry may be much more difficult unless the GOC develops a work-around that addresses their constitutional issue while protecting our shared security interests. End summary.

¶2. (SBU) State Department Political-Military Affairs Deputy Assistant Secretary Greg Suchan met with Canadian Department of Foreign Affairs and International Trade (DFAIT) Export Control experts and Public Works officials responsible for Canada's Controlled Goods Program (CGP) in Ottawa on October 31, and with Department of National Defense (DND) and DFAIT officials on November 1. They discussed U.S. International Traffic in Arms Regulations (ITAR) requirements relating to Canadian dual-nationals from proscribed countries like China, Iran and North Korea per Part 126.1 of the ITAR. L/PM attorney Darin Johnson and Deborah Carroll from PM's Office of Defense Trade Controls Compliance accompanied DAS Suchan to Ottawa.

GOC / Industry: Charter Precludes ITAR "Discrimination"

¶3. (SBU) DFAIT DG for Export Controls Suzanne McKellips told DAS Suchan that ITAR provisions barring 126.1 Canadian dual-nationals from gaining access to U.S. technologies violated non-discrimination protections in Canada's Bill of Rights equivalent, the Charter of Rights and Freedoms. The critical provision of the Charter states that "every individual is equal under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, Qbased on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In other words, according to Canadian officials, employers cannot pose a question regarding national origin or dual citizenship to an employee if the answer could result in discriminatory action.

¶4. (SBU) GOC attorneys have advised the government that the Charter precludes asking a worker whether he was a Canadian citizen much less, say, a dual-national Canadian-Iranian. Thus, they reasoned, U.S. ITAR requirements relating to 126.1 nationals run counter to the Charter and could jeopardize Canada's new multi-billion dollar procurements of defense articles, as well as the GOC's ability to secure timely delivery of equipment to Canadian soldiers deployed to the NATO-ISAF mission in Afghanistan.

#### Ministers Intervene

¶5. (SBU) Canada's Ministers of Foreign Affairs, Defense, and International Trade raised the Charter concerns in a joint letter sent to Secretary Rice on October 27. They asserted that the ITAR requirements on some dual nationals severely

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hampered Canada's ability to "stand shoulder-to-shoulder (with the U.S.) in conflict areas" and that the requirements also disadvantaged Canadian industry. Increasingly, the ministers argued, USG insistence that U.S. exporters identify the nationalities of individuals with access to ITAR controlled items could create serious difficulties in proceeding with defense contracts. Without elaborating, the ministers suggested that the two governments focus "on security, rather than nationality," as the basis to address U.S. security concerns and to address Canadian legal concerns. They also proposed a senior level bilateral working group tasked to work out the details of such an approach and report back no later than January 2007.

#### Industry

¶6. (C) Public Works and Government Services Canada's Director General for Controlled Goods and Industrial Security Gerry Deneault provided DAS Suchan on October 31 with a matrix that outlined the vetting process done by companies for work on unclassified controlled goods in Canadian industry, noting that it focused on honesty, reliability and trustworthiness. DG Deneault acknowledged that vetting by companies did not take loyalty into account, noting that loyalty only came into play with the roughly 15 percent of workers in industry who held confidential or higher security clearances. Denault explained that the Canadian government vets the security officer who serves as the controlled goods point of contact in each registered company. It is that individual who is responsible for conducting the vetting, which is paid for by the company. Denault did not refute DAS Suchan's assertion that loyalty was a critical factor in protecting ITAR-covered goods and services area given China and other 126.1 countries' track record of establishing front companies in Canada and of coercing their emigre nationals into diverting controlled weapons technology to their original homelands.

¶7. (SBU) Deneault noted that the Controlled Goods Program (CGP) has registered 2,300 businesses with 2,800 sites, and that his office had conducted 1,800 inspections. Responding

to DAS Suchan's request for a sense of how many infractions and violations inspectors had uncovered, Deneault said that his office had referred a handful of potential criminal cases to the RCMP but that no one had yet been prosecuted as a violator of CGP regulations. (Note: This was confirmed by DHS officers at Embassy Ottawa who observed that Canadian prosecutors avoided such cases because the associated criminal penalties were almost insignificant. End note). It remains unclear as to whether a dual national's access to ITAR-controlled defense items under a U.S. export authorization would be considered a violation in Canada.

18. (SBU) DAS Suchan asked DFAIT DG McKellips whether there was a potential national security exemption to the apparent Qwas a potential national security exemption to the apparent Charter prohibition against taking national origin into account. McKellips said she would look into a possible security exemption, and would also see whether there might be a foreign policy justification as well. Public Works' Denault ended this line of inquiry on a somewhat hopeful note, saying that he had an idea about how the CGP could be used to address the 126.1 concerns, but that he was not yet ready to discuss it.

DND First, Industry Later

19. (SBU) On November 1, Joint Strike Fighter Project Manager and DND meeting convener Michael Slack emphasized that the GOC's top priority was to solve ITAR-related issues involving Department of National Defense uniformed and civilian employees, DND's embedded contractors, and officials from other government departments serving in DND. Canada wanted to reach agreement in this critical area before addressing ITAR issues in the private sector, which Slack acknowledged would be an even greater challenge. DND's proposal would be

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to require Secret-level security clearances for all DND employees with a need to access even unclassified ITAR-controlled defense items, to provide the State Department an audit of DND activities in this regard, and appoint a (Canadian) security manager within DND. Slack explained that the requirement for access to classified information requires the individual to consent to be investigated. That consent allows the GOC to ask about country of birth and dual citizenship. The individual has the right to revoke that consent during the clearance process. Slack and DAS Suchan led a review of the specific difficulties the GOC faced in complying with rules governing entities and individuals who had actual or potential ties to the ITAR Part 126.1 list of proscribed nations.

110. (SBU) Unlike industry, Slack explained, DND could probably require security clearances of its employees, contractors, and secondees who worked on ITAR-controlled unclassified defense articles and services. The clearance

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process required disclosure of place of birth and nationalities held. He estimated that 80 percent of DND civilians and 90 percent of the Canadian military held security clearances of Secret or higher. Perhaps one percent, he guessed, would be considered 126.1 dual nationals. The Canadians did not have figures for embedded contractors or other agency personnel seconded to DND, but agreed to collect and convey the data to DAS Suchan.

111. (C) DAS Suchan said DND needs to persuade the USG that its security clearance procedures would convince any reasonable person that a Canadian citizen who might have a legal claim to citizenship in a proscribed country (e.g., because he was born in China or Iran) should not be considered a proscribed country national. Despite Slack's assurances, critical questions arose during the discussion of the processing of GOC security clearance investigations. Canadian security investigators did not necessarily pose

questions to determine whether persons had ties to 126.1 countries. There has been no automatic line of inquiry on nationality, with analysts empowered to decide whether to pursue dual-nationality and related loyalty issues when investigating clearance applications. Clearance questioning, according to DAS Suchan's interlocutors, was usually limited to the previous five, seven, or ten years depending on whether a security clearance was confidential, secret, or top secret respectively. This could mean that GOC investigators

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could chose not to explore loyalty issues related to a Canadian 126.1 dual national, particularly if five to 10 years had passed since an individual immigrated to Canada. Slack was asked whether the use of clearance screening for access to unclassified information would require a regulation change by the Treasury Board. Slack indicated that he would Qchange by the Treasury Board. Slack indicated that he would check.

¶12. (SBU) The meetings ended with DAS Suchan stressing to Slack that the USG would not now, and will not in the future, approve the transfer of U.S. defense items to nationals of proscribed countries. He repeated, however, that the USG was prepared to use a "rule of reason" on the facts of a specific case to determine whether somebody who might have been born in a proscribed country or inherited such a nationality from his parents should still be considered to be a 126.1 national today.

¶13. (C) DAS Suchan also emphasized that there was much more for the GOC to do before the USG could conclude that a holder of a DND security clearance was not, or was no longer, a 126.1 national. His GOC interlocutors agreed to study the issue further and to continue the discussion in Washington, D.C. on November 21.

¶14. (C) Comment: It is Canadian law that appears to prohibit inquiring into nationality information in most cases which is making the problem hard to solve. In the end it will most likely be up to the Canadians to find a national

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security work-around that address their Charter issues and our shared security interests. End Comment.

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